BEFORE THE FEDERAL ELECTION COMMISSION

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) **MUR 7151**
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RESPONSE OF DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT, INC. AND TIMOTHY JOST, TREASURER, TO THE COMPLAINT

By and through undersigned counsel, Donald J. Trump, Donald J. Trump for President (the "Committee"), and Timothy Jost, as Treasurer (collectively, "Respondents") respond to the complaint in the above-captioned MUR. We respectfully request that the Commission find no reason to believe a violation has occurred, dismiss the complaint, and close the file.

I. BACKGROUND

Without factual or legal support, Complainants allege that Rudy Giuliani's participation in a television ad aired by an independent expenditure-only committee during the 2016 presidential campaign amounts to a coordinated communication and an unlawful in-kind contribution to the Committee. Nevertheless, Complainants have failed to demonstrate that this ad satisfies the legal definition of a coordinated communication. Complainants have not alleged any facts that would demonstrate that the Committee satisfied the conduct prong under the coordination regulations. And indeed they cannot. The Committee was not involved in the creation of the ad, the Committee did not authorize or direct Rudy Giuliani to participate in the ad, and the Committee did not have any knowledge of the ad prior to its broadcast on television.

Instead, Complainants hang their entire argument on the notion that Rudy Giuliani was acting as an "agent" of the Committee when participating in the advertisement and therefore the Committee, through an agent, was "materially involved" in the creation the communication. Yet, the Complaint does not include any facts that would establish Rudy Giuliani as an agent of the

campaign under the FEC's definition of agency. Giuliani is neither a director nor an officer of the Committee, nor does he appear on the campaign payroll as an employee or consultant. He has not been authorized by Donald J. Trump or the Committee to act as their agent nor did the candidate's or the Committee's conduct imply that Giuliani was to act as an agent on their behalf. Rather, as a friend of the candidate, Giuliani provided informal advice and counsel to the candidate on an ad hoc, volunteer basis, just as Howard Dean reportedly provided informal advice and counsel to Hillary Clinton and her presidential campaign. In fact, publicly available reports indicate that the ad in question aired on or about July 25, 2016. It was more than two months after the ad aired that Giuliani began to engage on a more regular basis as a volunteer surrogate on behalf of the campaign, taking a leave of absence from his law firm to do so effective October 6, 2016.[1]

Further, even if Giuliani were, in some instances or limited purposes a campaign agent, which he was not, the Complaint ignores clear Commission precedent that allows individuals to wear "multiple hats," even if the individual may, at times, act as an agent of a federal candidate. It also disregards the exception under the conduct prong of the coordination regulations that explicitly states that "material involvement" is not satisfied where the information material to the creation, production or distribution of the communication was obtained from a publicly available source, as it was here.

In short, Complainant's core argument is without factual or legal support. At bottom, this Complaint is nothing more than a partisan, political attack on the Republican nominee for President by Donna Brazile and the Democratic National Committee, filed in the thick of the

[1] Sara Randazzo, "Ex-New York Mayor Rudy Giuliani Takes Law Firm Leave to Back Donald Trump," *Wall Street Journal*, October 6, 2016.

closely contested presidential campaign. For these reasons, the Commission should recognize that the Complaint is without merit and it should be promptly dismissed.

II. ANALYSIS

A. The Complaint fails to establish that Rudy Giuliani was an agent of the campaign and the campaign was therefore materially involved in the creation of the advertisement.

Complainants adopt a faulty definition of agency as the basis for its allegation that the Committee was materially involved in the creation of the ad and therefore triggered the conduct prong of the coordination regulations. However, under Commission regulations and precedent, an "agent" is an individual who has "actual authority" to act on behalf of a principal, and not merely an individual who has "apparent authority" to do so. Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49082 (July 29, 2002) (hereinafter "2002 Soft Money E&J"). Specifically, the Commission's definition of "agent" "does not apply to individuals who do not have any actual authority to act on their [principal's] behalf, but only 'apparent authority' to do so." *Id.* As the Commission has later stated, "[a]ctual authority is created by manifestations of consent (express or implied) made by the principal *to the agent.*" *Explanation and Justification for Definition of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures*, 71 Fed. Reg. 4975, 4976 (Jan. 31, 2006) (hereinafter "2006 Agency E&J").

Indeed, through these Explanation and Justifications, the Commission has gone to great lengths to clearly articulate the meaning of the term "agent," which is drawn from the core principles of agency law. As treatises on agency law make clear, "the term 'express authority' often means actual authority that a principal has stated in very specific or detailed language." Restatement (Third) of Agency § 2.01, cmt. b (2006). Moreover, "implied authority"

is used to mean actual authority "to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent." *Id.* Therefore, the Commission has noted that, "[i]t is well settled that whether an agent has implied authority is within the control of the principal." 2002 Soft Money E&J at 49083. As such, "a principal may not be held liable, under an implied actual authority theory, unless the principal's own conduct reasonably causes the agent to believe that he or she had authority." *Id.* "Implied authority is a form of actual authority," but "should not be confused with apparent authority, which is a distinct concept." *Id.* at 49082-83 (citations omitted).

By contrast, "[a]pparent authority ... is the result of manifestations the principal makes to a *third party* about a person's authority to act on the principal's behalf." 2006 Agency E&J at 4976, citing to the Restatement (Second) of Agency 1958). "Apparent authority is created where the principal's words or conduct 'reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.'" *Id.* (citations omitted). "Moreover, to have apparent authority 'the third person must not only believe that the individual acts on behalf of the principal but, in addition, either the principal must intend to cause the third party to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such a belief.'" *Id.* (citations omitted). Thus, under the Commission's definition of agent, which requires actual authority, "merely acting in a manner that benefits another is not necessarily acting on behalf of that person." *Id.* at 4979 (citing Restatement (Second) of Agency)).

Despite the clear explication of agency law and the Commission's interpretation of it, Complainants disregard this guidance in asserting that Giuliani was an agent of the Trump

campaign. They do not offer any evidence that Donald J. Trump or the Trump campaign explicitly authorized him to act as their agent for purposes of the paid campaign communications strategy, nor do they offer proof that Donald Trump's conduct caused Giuliani to believe that he was an agent of Trump or the Committee for purposes of prosecuting a paid communications strategy or otherwise. In fact, the Complaint does not contain any information that suggests Giuliani sought or received approval of the campaign or the candidate to participate in the ad.

To the contrary, Rudy Giuliani appeared in the advertisement in his capacity as the former Mayor of New York and was identified on screen as "Former Mayor, New York City." At no point did the ad identify Giuliani as a Trump surrogate or as an advisor to the Committee in any capacity. In fact, the ad aired on July 25, 2016, more than two months prior to Giuliani taking a leave of absence to serve as a volunteer surrogate on behalf of the Committee. Based on the plain content of the advertisement, it is apparent that Giuliani was expressing his views on how to protect the American homeland and combat terrorism, subject matter with which Giuliani is familiar as a result of his leadership in New York City following the September 11, 2001 terrorist attacks. On these facts, Giuliani fails to meet the FEC's construction of the term "agent." He did not have actual authority to act on behalf of Donald J. Trump or the campaign. Nor did Giuliani's conduct suggest that he had such authority or was acting under it. Therefore, his actions cannot be imputed to the Committee for purposes of the coordination regulations.

B. The FEC has repeatedly permitted agents of federal candidates to 'wear multiple hats' such that an individual may act on behalf of himself or other clients apart from his status as an agent of a campaign.

Even if the Complainants' theory of agency were correct, which it is not, they also ignore clear FEC precedent which allows individuals to "wear multiple hats" such that they are not at all times agents of a federal candidate. 2002 Soft Money E&J at 49083. Indeed, the Commission's

definition of "agent" "contemplates a dual-agency scenario" provided that the agent is acting in his own capacity and exclusively on behalf of the non-federal candidate agent and not on the authority of a federal candidate or officeholder. 2002 Soft Money E&J and FEC Adv. Op 2003-10 (Reid) at 5 (June 16, 2003). As the Commission has stated, "a principal can only be held liable for the actions of an agent when an agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals. Specifically, it is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal." 2002 Soft Money E&J at 49083. For example, the FEC has determined that an individual who is an "agent" of a federal officeholder may solicit soft money for a state party as long as the solicitations are "not on the authority" of the officeholder. *See* FEC Adv. Ops. 2015-09 (Senate Majority PAC), 2003-10 (Reid), 2007-5 (Iverson).

Indeed, as recently as last year, the Commission explained that a federal candidate's agents would not be acting on behalf of the federal candidate when soliciting soft money contributions for an independent expenditure-only political committee if the individuals:

- Identify themselves as raising funds only for the independent expenditure-only committee;
- Do not use their campaign titles or campaign resources (such as letterhead and email);
- Inform potential contributors that they are making the solicitation on their own and not at the direction of the federal candidate or their agents; and
- Do not solicit contributions for the federal candidate and the independent expenditure-only political committee at the same time.

See Senate Majority PAC Adv. Op. at 7-8.

Even if he were an agent, which he was not, Giuliani's participation in the ad in question adhered to this guidance. By avoiding any reference to his role as an informal campaign advisor or friend of Donald J. Trump, Giuliani made clear that he was operating separate and apart from the Committee and not at the Committee's direction. Yet Complainants gloss over these facts and precedent altogether, and continue to build on their faulty argument falsely asserting that Commission precedent holds that *any individual* "appearing in an advertisement in a speaking role means that the person was 'materially involved' [in] its creation." DNC Complaint at 5 citing FEC Adv. Ops. 2004-01 (Bush/Kerr) and 2003-25 (Weinzapfel). Complainants' selective quotations of those Advisory Opinions distorts the precedent. In the cited advisory opinions, the Commission specifically considered whether a *candidate's* appearance in an advertisement would constitute material involvement. The Commission concluded that, "it is highly implausible that a Federal candidate would appear in a communication without being materially involved in one or more of the listed decisions regarding the communication." FEC Adv. Op. 2004-01 (Bush/Kerr) citing FEC Adv. Op. 2003-25 (Weinzapfel) (emphasis added). While that may be true, those are not the facts here. Rudy Giuliani is not a federal candidate nor is he an agent of a federal candidate. In fact, it is highly plausible that the appearance in a political ad by a non-candidate with a long history of advocating for Republican candidates and causes would instead be related to the individual's stature as a party elder rather than to his role with a particular political campaign. Furthermore, as the Commission understands, advisory opinions are specific to the activity set forth in a request and may not be used as a sword against others. For all of these reasons, Complainants' use of the cited advisory opinions is inapt.

C. *The Complaint fails to establish that each of the three prongs of the coordination regulations were satisfied.*

In order for a communication to meet the definition of a coordinated communication, it must satisfy each of three prongs in the coordination regulation laid out at 11 CFR § 109.21. First, the communication must be paid for by a person other than the candidate, candidate's committee or a political party committee. *See* 11 CFR § 109.21(a)(1). Second, the communication's content must satisfy at least one of five standards, such as content that expressly advocates the election or defeat of a clearly identified federal candidate. *See* 11 CFR § 109.21(c)(3). Third, and finally, in order for a communication to be coordinated, at least one of five types of conduct must have occurred. Those types of conduct are as follows:

- The communication is created, produced, or distributed at the request or suggestion of the candidate, candidate's committee, a party committee or agents of the above; or the communication is created, produced or distributed at the suggestion of the person paying for the communication and the candidate, authorized committee, political party committee or agent of any of the foregoing assents to the suggestion. *See* 11 CFR § 109.21(d)(1).
- The candidate, the candidate's authorized committee or party committee is materially involved in decisions regarding the content, intended audience, means, or mode of the communication, specific media outlet used, the timing or frequency or size or prominence of a communication. *See* 11 CFR § 109.21(d)(2).
- The communication is created, produced or distributed after one or more substantial discussions about the communication between the person paying for the communication or the employees or agents of that person and the candidate, the

candidate's committee, the candidate's opponent or opponent's committee, a political party committee or agents of the above. *See* 11 CFR § 109.21(d)(3).

- The person paying for the communication employs a common vendor with a campaign or party committee to create, produce or distribute the communication, and that vendor is currently providing services *or* provided services within the previous 120 days to the candidate or party committee and the vendor uses or conveys information about the campaign plans, projects, activities or needs of the candidate or political party committee to the independent expenditure-only committee which is material to the creation, production, or distribution of the communication. *See* 11 CFR §109.21(d)(4).
- A previous employee or independent contractor of a candidate's campaign committee or a party committee during the previous 120 days uses or conveys information about the plans, projects, activities or needs of the candidate or political party committee to the person paying for the communication, and that information is material to the creation, production or distribution of the communication. *See* 11 CFR § 109.21(d)(5).

While the communication at issue was clearly paid for by Great America PAC (an entity other than the Committee) and it contained express advocacy that satisfies the content prong of the coordination regulations, the Complaint fails to demonstrate that the candidate or the candidate committee staff, employees or consultants satisfied any of the elements of the conduct prong and thus the ad was a coordinated communication. As stated above, the Committee had no knowledge of this ad or involvement in its production or dissemination. There was no request or suggestion by the candidate, campaign or its agent that Great America PAC air such an ad, or

any discussion of the ad between the candidate, campaign, or its agent and the PAC. Finally, none of the campaign's current or former employees or vendors assisted with the production of the Great America PAC ad. As such, the conduct prong of the coordination regulations was not satisfied, as detailed more fully below.

D. ***The information material to the creation of the ad was obtained from publicly available sources and therefore the material involvement provision of the conduct prong is not satisfied.***

The Commission must reject Complainants' assertion that the communication satisfies the conduct prong of the coordination regulations based on the simple reason that information material to the creation of the ad was obviously obtained from publicly available sources and thus within the exception to the material involvement standard. As explicitly stated in the coordination regulations, that standard "is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source." 11 CFR § 109.21(d)(2). National security was a key theme through the 2016 presidential election, in light of multiple attacks that occurred during the campaign, including the mass shootings in San Bernardino and Orlando. There was ample news coverage of the candidates' emphasis of these themes throughout the campaign, including around the time that the ad was aired.[2] As such, it is wholly unsurprising that an independent group such as Great America PAC would produce an ad based on this publicly available information. Certainly, such an ad does not require knowledge of any internal needs, plans or strategies of the campaign. Indeed,

[2] Dozens of news articles chronicled the Trump campaign's emphasis on national security and Donald Trump's plan to combat domestic terrorism. In fact, the first day of the Republican National Convention was built around the theme of national security and the Trump plan to combat domestic terrorism. *See* Gregory Korte, "Monday's GOP Theme Hammers on Threats at Home," *USA Today*, July 18, 2016. Other news stories also reported on these themes. *See, e.g.*, Demetri Sevastopulo and Courtney Weaver, "Donald Trump promises security and prosperity as US President," *Financial Times*, July 22, 2016; MJ Lee, "Trump's grip on race unchanged by national security focus," *CNN*, Nov. 19, 2015; Caitlin Huey-Burns and Alexis Simendinger, "Candidates shift focus to terrorism, immigration," *Real Clear Politics*, Sept. 19, 2016.

Complainants fail to identify any content in the advertisement that was not based on publicly available information. Therefore, they have failed to establish that the conduct prong of the coordination regulations has been satisfied.

III. CONCLUSION

As briefed extensively above, the Complaint is without any factual or legal basis. Since the Commission's enforcement procedures require complaints to "contain a clear and concise recitation of the facts which describe a violation of a statute or regulation," the Complaint must be dismissed. 11 CFR § 111.4. The Reason to Believe standard requires even more. *See* MUR 6554 (Friends of Weiner), Factual & Legal Analysis at 5 ("The Complaint and other available information in the record do not provide information sufficient to establish [a violation]."); MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 2 ("Unwarranted legal conclusions from asserted facts will not be accepted as true."). Therefore, there is no basis for the Commission to find reason to believe that the Committee violated the law.

For the foregoing reasons, Respondents respectfully request that the Commission find that there is no reason to believe a violation occurred, dismiss the matter, and close the file.

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